In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 336

LOUIS S. NELSON, Warden, California State Prison at San Quentin,
Petitioner,

vs.

JOE J. B. O'NEIL,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General,
DERALD E. GRANBERG,
Deputy Attorney General,
CHARLES R. B. KIRK,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-2044,
Attorneys for Petitioner.

Topical Index

Table of Authorities Cited

Statutes

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No.

LOUIS S. NELSON, Warden, California State Prison at San Quentin,
Petitioner,

vs.

JOE J. B. O'NEIL,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner, Louis S. Nelson, appellant below respectfully petitions that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court entered on January 26, 1970, affirming the Order of the United States District Court for the Northern District of California.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 422 F.2d 319 (1970), and is also appended hereto as

Appendix A. The opinion of the United States District Court for the Northern District of California is unreported and is appended hereto as Appendix B.

JURISDICTION

On January 26, 1970, the United States Court of Appeals for the Ninth Circuit affirmed the order of the United States District Court for the Northern District of California granting Joe J. B. O'Neil's petition for a writ of habeas corpus and ordering him released from state custody. A petition for rehearing was received one day late but was ordered filed by the court. The petition for rehearing was denied, with one judge dissenting, on April 23, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether *Bruton v. United States*, 391 U.S. 123 (1968), is violated when a confessing codefendant testifies on the stand, but denies making the statement implicating his codefendant.

2. Whether, under the circumstances of this case, admission of the codefendant's confession was harmful.

3. Whether the doctrine of comity between federal and state jurisdictions and the burden of habeas corpus petitions upon the federal judiciary oblige a federal district court to require a state prisoner to

exhaust state remedies made available by newly-announced constitutional standards.

STATUTE INVOLVED

This case involves interpretation of Title 28, United State Code, Section 2254(b), which provides:

> "An application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an abuse of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Joe J. B. O'Neil, the petitioner for a writ of habeas corpus below and the respondent herein, was sentenced to state prison by the Los Angeles County Superior Court on July 17, 1965, after a jury had found him guilty of kidnapping for purposes of robbery, robbery in the first degree, and vehicle theft. He appealed to the California Court of Appeal, Second Appellate District, which affirmed his conviction in an opinion filed on March 30, 1967 (certified for non-publication). A petition for rehearing was denied on April 26, 1967. He did not file a petition for hearing with the California Supreme Court. An application to recall

the remittitur was denied by the California Court of Appeal on February 7, 1967.

O'Neil filed a petition for a writ of habeas corpus with the California Supreme Court on March 7, 1968, which was denied without opinion on March 20.

B Proceedings in the Federal Courts

On April 25, 1968, O'Neil filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California. An order to show cause was immediately issued and petitioner filed a return thereto on May 17, 1968. A supplemental return was filed on June 10, 1968, and a second supplemental return was filed on June 13.[1] O'Neil's traverse was filed on June 21, 1968.

On July 12, 1968, the District Court granted the writ and ordered O'Neil discharged from custody. It also provided that execution thereof was to be stayed ten days to permit filing of a notice of appeal and, in the event an appeal was taken, custody was not to be disturbed until further order of the court.

Petitioner's notice of appeal was filed on July 22, 1968, and a certificate of probable cause was issued the same day.

On January 26, 1970, a panel of the United States Court of Appeals, with one judge dissenting, affirmed

[1]The first supplement became necessary when this Court overruled *Delli Paoli* in *Bruton v. United States*, 391 U.S. 123 (1968), after we filed our return to the order to show cause. The second became necessary when, in *Roberts v. Russell*, 392 U.S. 293 (1968), this Court held the new *Bruton* rule fully retroactive.

the order of the District Court. A petition for rehearing, received one day late, was ordered filed but on April 23, 1970, the petition was denied with one judge dissenting.

STATEMENT OF FACTS

On February 8, 1965, at approximately 10:30 p.m., Mr. Vance Collins was seated in his 1956 two-door, white Cadillac which was parked in the lot of a supermarket located at 3993 South Western Avenue in the City of Los Angeles. He was awaiting his wife's return from grocery shopping. (RT 10-12.)[2]

Respondent O'Neil approached the passenger door of the Collins' automobile, opened it, and got in. Respondent had a silver-plated gun and was pointing it at Mr. Collins. Respondent told him, "There is a fellow on your other side. Would you let him in?" The driver's side of the door was opened, and Mr. Collins leaned forward to let the second man in. The second man, respondent's codefendant Runnels, sat down in the rear seat. (RT 12-15.)

Respondent told Mr. Collins to back the car out of the lot. Mr. Collins, in fear, did as he was told. Respondent continued to give him directions. As the victim drove, respondent told him that he "might get hurt real bad" if he didn't have money. Respondent ordered Mr. Collins to hand over his wallet. Eight

[2]As hereinafter used, "RT" refers to the reporter's transcript of respondent's state trial which was lodged with the District Court below.

dollars was taken, and Runnels returned the wallet to him. (RT 16, 18-20.)

Approximately three and one-half blocks from the market, respondent ordered the victim to stop and exit from the car. Respondent still had the gun pointed at him. Respondent ordered Mr. Collins to walk to the rear of the car and then to cross the street. Runnels got out of the back seat and stood beside the vehicle for some time. Runnels then got into the driver's seat and drove away with O'Neil. Mr. Collins returned to the market and notified the police. (RT 17, 22-24, 42-43, 60.)

Approximately 1:00 a.m., February 9, 1965, a police patrol unit received a radio message that a suspicious white automobile with two male Negro occupants was circling a liquor store. The officers drove to the liquor store and talked to the manager. The manager told the officers that the white vehicle was first pointed out to him by a customer. The manager then observed the vehicle circle the block two or three times. These circumstances caused the manager to become apprehensive and telephone the police. (RT 63, 67-68, 72, 89.)

At this point, one of the officers saw a white car with two male Negroes approaching in an alley near the liquor store. The vehicle was going slowly, and the manager said, "That is the vehicle". The automobile was a 1956 white Cadillac. (RT 69, 70, 75.)

Officers began following the Cadillac. O'Neil was the passenger and Runnels was the driver. During the

pursuit, O'Neil was observed to throw what appeared to be a shiny revolver from the car. Officers, with the red light and siren, stopped the suspects. On the basis of the radio call and the weapon, both occupants were taken into custody on suspicion of armed robbery when they alighted from the vehicle. Officers returned to the location where the object landed and retrieved a silver-plated .22 caliber revolver which was loaded with four bullets. (RT 63-66, 71, 75, 78-80.)

O'Neil and Runnels were taken to the Culver City Police station and the Cadillac was impounded. Approximately 4:00 p.m., February 9, 1965, they were formally arrested by Los Angeles Police officers and were taken to the University Police station. On the evening of February 9, 1965, Mr. Collins went to the University Police Station. He was told that the thieves may have been apprehended. Mr. Collins was asked to view a police lineup and he positively identified O'Neil and Runnels from the lineup. (RT 26-27, 34-35, 48, 80, 96.)

The next day, February 10, 1965, at approximately 10:20 a.m., Officer Traphagen had a conversation with Runnels. Runnels was advised that he did not have to say anything; that anything he said might be used in a later criminal prosecution; and that he had a right to an attorney. There was no coercion nor were there any promises of immunity. Runnels proceeded to make a complete confession implicating O'Neil. The court admitted the confession with an admonition to the jury that it was not to be considered against O'Neil. (RT 92-93, 102-05.)

The Defense

The mother and sister of O'Neil testified that he and Runnels came to the O'Neil home approximately 9:00 p.m. on February 8, 1965. They departed shortly after 11:00 of that same evening. The mother also testified that after her son's arrest, she was told by Mr. Collins that he was unsure of the identification. (RT 162-63, 167, 175-77.)

Mr. Lee Brooks testified that on February 8, 1965, at approximately midnight, he observed O'Neil and Runnels sitting in a big white car near 61st Street and Vermont Avenue in the City of Los Angeles. An unknown man approached the car and began conversing with them. The man handed what appeared to be keys to one of them. Runnels got into the driver's seat and drove off with O'Neil. (RT 145-47, 149-52, 157.)

Runnels testified that he was with O'Neil on the afternoon and evening of February 8, 1965. Runnels stated that he and O'Neil left the O'Neil household approximately 11:00 p.m. While sitting at a bus stop around midnight, they obtained a ride from a person known as "Gary". Gary was driving a white 1956 Cadillac. He drove them to a night club and went inside. They remained seated in Gary's automobile. Shortly thereafter, Gary returned to the car and began conversing with O'Neil. Approximately 12:20 a.m., February 9, 1965, Gary gave the keys to O'Neil. O'Neil was directed to bring the car back to the night club around 2:00 a.m. (RT 181, 185-89, 200, 207.)

Since O'Neil did not have a driver's license, Runnels drove. They headed for Santa Monica, but on

the way O'Neil discovered a gun in the glove compartment. They drove around the block and into an alley to find a place to throw the gun. O'Neil threw the gun out of the window. At this point, they were stopped and arrested by police. Runnels denied making any statement to police officers. (RT 189-92, 211, 213.)

Miss Mildred Manchester, the common law wife of Runnels, testified that she talked with Officer Traphagen on the morning of February 11, 1965. She was informed that the officer would see that Runnels got a life sentence if no statement was made as opposed to a lesser sentence if the statement was forthcoming. She was asked to see what could be done. Later that day, Miss Manchester received a telephone call from Runnels, and she relayed the officer's message. Runnels informed her that he was not going to make a statement. (RT 137-38, 140, 143.)

O'Neil testified that he spent the evening of February 8, 1965, in the company of Runnels. His version of the facts paralleled the story told by Runnels. In addition, O'Neil was able to identify "Gary" as James Garret. O'Neil admitted knowing the residence of Garret, but on cross-examination indicated that no attempt was made to subpoena him. (RT 217, 220, 238.)

REASONS FOR GRANTING THE WRIT

There are several important reasons why this Court should grant the petition for certiorari. First, the decision of the Ninth Circuit herein is in direct conflict

with the decision of the Fifth Circuit in *Baker v. Wainwright*, 422 F.2d 145 (5th Cir. 1970), and review by this Court is necessary to resolve the issue. And second, petitioner believes that the Ninth Circuit has erroneously interpreted the confrontation rule set out in *Bruton v. United States*, 391 U.S. 123 (1968), and by misreading *Douglas v. Alabama*, 380 U.S. 415 (1965), contorted the right of confrontation beyond reason.

In addition, even assuming *Bruton* error during O'Neil's trial, the Court of Appeals erroneously concluded that it was harmful in view of the facts of this case.

Lastly, the District Court, in an action endorsed by the Ninth Circuit, refused to require a state prisoner to exhaust available state remedies before resorting to federal habeas corpus. This can only have the effect of damaging delicate federal-state relations and unduly burdening the federal judiciary.

ARGUMENT

I

THE WRIT SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS.

In the present case, O'Neil and Runnels were tried by the State of California for kidnapping for purposes of robbery, robbery in the first degree, and vehicle theft. The defendants had entered the victim's car parked in a super market parking lot, took his money at gunpoint, forced him to drive several blocks

and then forced him out and drove off with his car. Several days after the arrest, Runnels confessed, implicating O'Neil.[3] Both defendants took the stand and gave alibi testimony. On both direct and cross-examination, Runnels denied ever making the statement. The Ninth Circuit held:

> "It is true that in O'Neil's case Runnels did take the stand and was thus available for cross-examination. But he did not 'affirm the statement as his'; he flatly denied making it. . . .
>
> "The damage done by the out-of-court statement was just what it would have been had Runnels refused to take the stand at all." *Id.* at 321 (App. A at iv-v).

In *Baker v. Wainwright,* 422 F.2d 145 (5th Cir. 1970), Baker and Damron had been tried by the State of Florida for robbery, kidnapping, and false imprisonment, and were convicted of robbery. Damron confessed to the robbery, claiming that Baker was the instigator. However, Damron took the stand and denied making the statement.

> "As the Florida Court of Appeals held [*Baker v. State,* 217 So.2d 880, 885 (Fla.App. 1969)], Baker was not denied the right to be confronted with any witness against him. In James v. United States, 416 F.2d 467 (5th Cir. 1969) this court upheld the conviction of a non-confessing joint defendant over a *Bruton* objection in a joint trial

[3]The Court of Appeals observed that Runnels' confession gave credit to O'Neil as the mastermind of the crime, *O'Neil v. Nelson,* 422 F.2d 319, 320 (9th Cir. 1970) (App. A at ii), an assessment with which petitioner disagrees. But even if this were a proper analysis, then *O'Neil* is even closer to *Baker v. Wainwright,* discussed *infra.*

> where the confessing defendant took the stand and was subject to cross-examination. . . . Baker's right under the Sixth Amendment to be confronted with the witnesses against him was in no way denied in the case at bar because Damron took the stand and made himself subject to cross-examination by Baker. Indeed as the Attorney General of Florida contends, the most skillful cross-examiner could not have produced a better result for Baker than Damron's testimony that his entire confession had never been made and that neither he nor Baker robbed Infinger." *Id.* at 147-48 (footnotes omitted).

O'Neil and *Baker* are on all fours, both on their facts and the principles of law applicable thereto, but they reach directly opposite results. Therefore, this petition should be granted to resolve the issue of law presented by these cases.

II

THE SIXTH AMENDMENT RIGHT TO CONFRONTATION IS SATISFIED IF THERE IS AN OPPORTUNITY TO CROSS-EXAMINE.

Citing *Douglas v. Alabama,* 380 U.S. 415 (1965), *Bruton v. United States,* 391 U.S. 123 (1968), and *Townsend v. Henderson,* 405 F.2d 324 (6th Cir. 1968), the majority opinion below concludes that O'Neil was denied the right of confrontation because Runnels denied making a confession and thereby precluded effective cross-examination. *O'Neil v. Nelson, supra,* at 321 (App. A at iii-v). In so doing, the majority miscon-

strues *Douglas,* misinterprets *Bruton,* and both misconceives and fails to examine the options available under the right of confrontation.

As the Sixth Circuit did in *Townsend v. Henderson, supra,* at 329, the majority seizes upon fortuitous language found in *Douglas,* and quoted in *Bruton,* for the proposition that only if the confessing codefendant *admits* making the statement (here, Runnels denied making it) can the accused have effective cross-examination, *O'Neil v. Nelson, supra,* at 321 (App. B at iv):

> "[E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his. Loyd did not do so but relied on his privilege to refuse to answer." *Douglas v. Alabama, supra,* at 420, quoted in *Bruton v. United States, supra,* at 127.

Yet when this Court in *Douglas* noted that "effective confrontation of Loyd was possible only if Loyd affirmed the statement as his," the Court was merely stating that cross-examination was impossible where a codefendant stood fast on his right against self-incrimination. Obviously, as long as Loyd invoked his fifth amendment right, he could not be cross-examined, whereas if he waived that right and testified, then he could be fully cross-examined. That this is indeed the proper interpretation of *Douglas* is suggested by *California v. Green,* ..... U.S. ....., ..., 30 U.S. Sup. Ct. Bull. B2329, B2341-42 (June 23, 1970), in which this Court stated:

> "[I]n *Douglas v. Alabama,* . . . the defendant's supposed accomplice, Loyd, . . . refused to testify

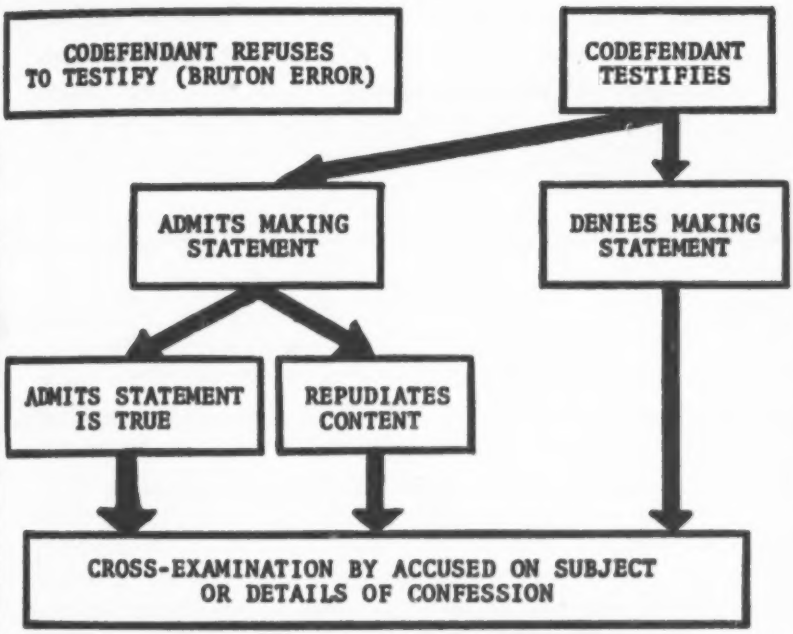
> on self-incrimination grounds. The confrontation problem arose precisely because Loyd could not be cross-examined as to his prior statement; had such cross-examination taken place, the opinion strongly suggests that the confrontation problem would have been nonexistent."

The language from *Douglas* was quoted in *Bruton* because the same conflict between fifth and sixth amendment rights was involved. As this Court noted in *Green*, "[N]o confrontation problem would haxe existed if Bruton had been able to cross-examine his co-defendant." *California v. Green, supra,* ..... U.S. at ...., 30 U.S.Sup.Ct. Bull. at B2342 (footnote omitted).

Neither *Douglas* nor *Bruton* stands for the proposition that if the codefendant takes the stand, but denies rather than admits making the statement, an accused is deprived of an opportunity to subject his codefendant to effective cross-examination. This becomes patently clear when the options available to the accused are examined. As illustrated in Figure A, below, there are only a few possible avenues of cross-examination available when the confession of a co-defendant is introduced at trial.

Figure A

OPTIONS AVAILABLE TO CROSS-EXAMINE CONFESSING CODEFENDANT



If the codefendant does not take the stand (*Bruton*), or if he is called but refuses to testify (*Douglas*) then the accused cannot cross-examine him. However, if the codefendant testifies, he either admits or denies making the statement. If he admits making the statement, he either admits that the statement is true or repudiates its content and testifies that the statement

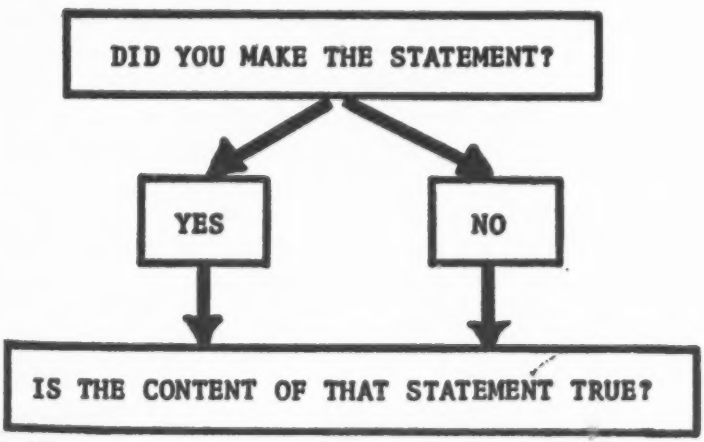
is false. But if the codefendant testifies, regardless of whether he admits or denies making the statement, he is always subject to cross-examination by the accused upon the subject or details of the confession. Whether the codefendant admits or denies making the statement, insofar as the accused's right of confrontation is concerned, the result is always the same. This is, in fact, suggested by the *Douglas* opinion:

> "In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right to cross-examination secured by the Confrontation Clause. . . . Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. . . . Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to him but not admitted [or denied] by him. Nor was the opportunity to cross-examine the law enforcement officers adequate. . . . [S]ince their evidence tended to show only that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself." *Douglas v. Alabama,* 380 U.S. 415, 419-20 (1965), partially quoted in *Bruton v. United States,* 391 U.S. 123, 127 (1968).

The defect in *Douglas* arose because Loyd's invocation of his right against self-incrimination precluded his cross-examination, and therefore Douglas could not cross-examine him as to whether "the statement had been made and that it was true." See also *Bruton v. United States,* 391 U.S. 123, 127 (1968). Even if the police officers could be examined as to whether the statement had been made, Loyd could still not be cross-examined "to test the truth of the statement itself. Thus *Douglas* demonstrates that, as illustrated by Figure B, there are only two possible questions that can be asked of a codefendant on cross-examination:

Figure B

CROSS-EXAMINATION OF CODEFENDANT



It is obvious that the availability of cross-examination into the substance of the statement does not depend upon whether the codefendant admits making the statement, for even if he does not, the accused may still inquire into the facts contained in the purported confession. The only consequence of the codefendant's denial as to making the statement is to convert a confession into an accusation. The availability and scope of inquiry remains the same.

That this type of cross-examination was possible in this case need not be subject of speculation, for such cross-examination was actually had, albeit by the prosecution and counsel for Runnels. For example, the prosecutor inquired as to whether Runnels had made the statement at all:

"Q. Now, do you remember talking to Officer Traphagen?

A. Remember talking to him?

Q. Yes, about this case?

A. Ain't talked to him about no case, no.

Q. Didn't you ever talk to him about the case?

A. No, I didn't talk to him about the case.

Q. Did he talk to you about the case?

A. Yeah, he talked to me about it.

Q. Did he ask you any questions about your whereabouts that night?

A. Yes, he asked me.

Q. Did he ask you whether or not you had robbed this man, Mr. Collins?

A. Yes, he asked me that.

Q. Did he ask you whether or not you had taken his car?

A. He asked me that.

Q. Did he ask you what you were doing down in Culver City.

A. Yes.

Q. Did you tell him that you had met O'Neil earlier that night and talked about committing some robberies?

A. I didn't tell him anything. I told him I had no comment to make.

Q. Didn't you tell him that you went down to the Better Food Market?

A. Well, after he told me whatever I said would be held against me, and I could wait to talk to a lawyer, I decided I would wait to talk to a lawyer, and I didn't make no statement.

Q. None whatsoever?

A. That's right." (RT 210:9-211:16.)

"Q. Didn't you tell Officer Traphagen you went into the liquor store?

A. I told you I made no statement to Mr. Traphagen.

Q. You refused to talk to him?

A. That's right.

Q. Everything Officer Traphagen said you told him, he is either mistaken or lying?

A. One of the two he is doing." (RT 213:4-12.)

On direct examination, Runnels denied making the statement. (RT 192:12-18.) He also denied its substance.

"Q. Have you committed this robbery?

A. No." (RT 192:10-11.)

Douglas requires that the accused be afforded an opportunity to cross-examine the confessing codefendant as to (1) whether he made the statement, and (2) the content of the statement. Such inquiry was made

by both Runnels' attorney and the prosecution, and is similar to that found to remove any possibility of *Bruton* error in *Santoro v. United States*, 402 F.2d 920, 922-23 (9th Cir. 1968). There is, as suggested in another case, no reason why O'Neil could not have done so too. See *Parker v. United States*, 404 F.2d 1193, 1196-97 (9th Cir. 1968). As the dissenting opinion states, *O'Neil v. Nelson, supra* at 325 (App. A at xv):

> "In either case, O'Neil would be privileged to cross-examine Runnels. The best O'Neil could hope for would be for Runnels to testify that the confession was false and that O'Neil did not commit the crimes. Here, Runnels gave O'Neil all that and more. He denied that he confessed and said that O'Neil was not at the scene of the crimes."

The Fifth Circuit made the same observation: that the confessing codefendant gives the defendant the maximum benefit of cross-examination when he denies making the statement. *Baker v. Wainwright*, 422 F.2d 145, 148 (5th Cir. 1970). And in *California v. Green, supra*, ... U.S. at ....., 30 U.S. Sup. Ct. Bull. at B2338, this Court suggested almost the same conclusion:

> "The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant."

It is obvious from *Bruton v. United States*, 391 U.S. 123, 128, 132, 136 (1968), and *Harrington v. Cal-*

ifornia, 395 U.S. 250, 252-53 (1969), that if the accused is given the *opportunity* to cross-examine, the sixth amendment right of confrontation has been satisfied. This seems to be the view of the various other courts of appeals.[4] Even four other panels of the Ninth Circuit have suggested as much.[5] It is the central holding of *California v. Green,* ..... U.S. ....., 30 U.S. Sup. Ct. Bull. B2329, B2337 (June 23, 1970). Mr. Justice Harlan, concurring in *Green,* gave "availability" special emphasis. *Id.,* ..... U.S. at ....., 30 U.S. Sup. Ct. Bull. at B2357, B2360-61. Insofar as the majority opinion below holds that O'Neil was denied the right of confrontation, it is wrong.

III

ANY POSSIBLE ERROR IN ADMITTING RUNNELS' CONFESSION WAS HARMLESS.

There are two reasons why any difficulty in cross-examining Runnels, arising because he denied making the statement, was harmless. The first of these is that the type of situation arising in O'Neil's case does not even give rise to error of constitutional dimension. As long as the declarant (here Runnels) is available

---

[4] *United States v. Insana,* 423 F.2d 1165, 1168 (2d Cir. 1970); see *McHenry v. United States,* 420 F.2d 927, 928 (10th Cir. 1970); *United States v. Cole,* 418 F.2d 897, 899 (6th Cir. 1969); *United States v. Weston,* 417 F.2d 181, 187 (4th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); *United States v. Hoffa,* 402 F.2d 380, 387 (7th Cir. 1968), *vacated on other grounds sub nom. Giordano v. United States,* 394 U.S. 310 (1969).

[5] *Ignacio v. Guam,* 413 F.2d 513, 515 (9th Cir. 1969); *Parker v. United States,* 404 F.2d 1193, 1196-97 (9th Cir. 1968); *Rios-Ramirez v. United States,* 403 F.2d 1016, 1017 (9th Cir. 1968); *Santoro v. United States,* 402 F.2d 920, 922-23 (9th Cir. 1968).

for cross-examination, then even the use of his statement as substantive evidence against his codefendant is not constitutional error. *California v. Green*, ___ U.S. ....., ..., 30 U.S. Sup. Ct. Bull. B2329, B2332-37, B2343 (June 23, 1970). O'Neil got even better than that, for the evidence was admitted only against Runnels. (RT 102.)

Secondly, under *Harrington v. California*, 395 U.S. 250 (1969), *Bruton* error may be considered harmless where the evidence presented by the prosecution was overwhelming. Even if the disavowal of his confession by petitioner's codefendant and petitioner's failure to cross-examine his codefendant were considered *Bruton* error, since the evidence was overwhelming, and the confessions did not have a devastating impact upon petitioner's defense, any error was harmless.

Bruton error is "harmful" error only if the codefendant's confession has a devastating impact upon the non-confessing defendant's defense. In *Bruton v. United States*, 391 U.S. 123, 135 (1968), this Court observed that under some circumstances a jury could be expected to follow limiting instructions, while in others:

> "[1] the risk that the jury will not, or cannot, follow instructions is so great, and [2] the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

In *Bruton*, if the Evans confession were excluded, Bruton's involvement in the crime rested solely upon the testimony of a single witness whose identification

could not be supported through the testimony of the only other eyewitness. Since neither defendant offered a defense, the Evans confession obviously had a "vital" impact upon the case. The necessity of a vital impact before *Bruton* error can be held harmful has also been suggested by several courts which have applied the rule.[6]

In *Harrington v. California*, 395 U.S. 250, 254 (1969), the *Bruton* error was found harmless because "the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt. . . ." This Court therein noted that one of the confessing codefendants who implicated Harrington testified and was cross-examined. *Id.* at 253. Other witnesses "testified he had a gun and was an active participant." *Ibid.* Furthermore, "the case against Harrington was not woven from circumstantial evidence." *Id.* at 254. Even though the implicating confessions of two codefendants who did not testify were erroneously admitted, "*apart from them* the case against Harrington was . . . overwhelming. . . ." *Ibid.* (Emphasis added.) This Court thus held that *Bruton* error was harmless if overwhelming evidence apart from that erroneous under *Bruton* had been offered at trial.

---

[6]Cases finding no "vital impact" include: *Wapnick v. United States*, 406 F.2d 741, 742-43 (2d Cir. 1969); *United States v. Levinson*, 405 F.2d 971, 988 (6th Cir. 1968); see *Santoro v. United States*, 402 F.2d 920, 923 (9th Cir. 1968). Cases finding a "devasting effect" include: *United States ex rel. LaBelle v. Mancusi*, 404 F.2d 690 (2d Cir. 1968); *United States v. Jones*, 402 F.2d 851 (2d Cir. 1968).

The majority below concluded that Runnels' confession was "harmful" to the defense because "some doubt was raised about the victim's identifications," "the alibi witnesses stuck to their stories," and "the remarkable agreement between Runnel's [sic] out-of-court statement and the victim's testimony is very persuasive; the statement offers a plausible explanation of the defendant's motives and actions before, during and after the robbery." *O'Neil v. Nelson,* 422 F.2d 319, 322-23 (9th Cir. 1970). (App. A at viii.) The appropriate inquiry, however, is not whether the confession may have had any effect upon the trial, but whether it had a "devastating impact" upon the defense because of its content, the nature of the defense, and the state of the prosecution's evidence absent that confession.

Under the facts of this case, the Runnels confession could not have had any effect upon O'Neil's defense for a number of reasons:

(1) Absent Runnels' confession, the evidence was overwhelming. The victim, a percipient witness, positively identified O'Neil and Runnels as the two men who robbed him and stole his car, threatening him with a silver-plated pistol. O'Neil and Runnels were found driving the victim's car, and O'Neil was seen throwing a silver-plated pistol away.

(2) The confession did not have a devastating impact upon O'Neil's defense since:

(a) It was merely descriptive, and did not attempt to shift the blame to O'Neil. Compare

United States ex rel. LaBelle v. Mancusi, 404 F. 2d 690 (2d Cir. 1968).[7]

(b) O'Neil had the opportunity to cross-examine Runnels, but declined to do so. *Parker v. United States,* 404 F.2d 1193, 1196-97 (9th Cir. 1968).

(c) Runnels actually took the stand, denying having confessed and repudiating the contents of the confession by testimony contrary thereto. *Baker v. Wainwright,* 422 F.2d 145, n. 9 at 148 and accompanying text (5th Cir. 1970).

(d) Runnels' testimony at trial fully supported O'Neil's defense.

Insofar as the majority opinion concludes that any error was "harmful," it is erroneous.

IV

FAILURE TO ADHERE TO THE EXHAUSTION DOCTRINE UNDERMINES FEDERAL-STATE RELATIONSHIPS AND UNDULY BURDENS FEDERAL COURTS.

As the majority opinion notes, *O'Neil v. Nelson,* 422 F.2d 323 (9th Cir. 1970) (App. A at ix), "the *Bruton* question was never presented to the state

---

[7]The majority opinion states, "Runnels' purported statement . . . gives considerable credit to O'Neil for masterminding and directing the day's work." *O'Neil v. Nelson, supra,* 422 F.2d at 320. (App. A at ii.) The only support for such a conclusion to be found in Runnels' confession is where he states, "O'Neil asked him if he wanted to make a couple of hits," and "O'Neil had the gun . . . [and] went up to the driver . . . ." (RT 103.) In every other case, Runnels said "they" did this or that. The quoted passages can hardly be characterized as crediting O'Neil with "masterminding and directing."

courts for the very good reason that *Bruton* had not been decided when O'Neil filed his federal petition." Under previous decisions of the Ninth Circuit, a federal habeas petitioner was required to exhaust state remedies made available by the announcement of new constitutional standards before he could apply to the federal courts for relief. *Ashley v. California,* 397 F. 2d 270, 271 (9th Cir. 1968); *United States ex rel. Walker v. Fogliani,* 343 F.2d 43, 46-48 (9th Cir. 1965); *Blair v. California,* 340 F.2d 741, 744 (9th Cir. 1965).

Some court must assess the "*Bruton* error" in light of the trial record, and determine whether in view of the evidence at trial, and the nature and content of the confession, the admission of the confession was harmless. This task should initially be left to the state courts, which have shown their willingness to examine *Bruton* claims, see, *e.g., In re Whitehorn,* 1 Cal.3d 504, 506, 509, 82 Cal.Rptr. 609, 611-12 (1969), both in the interests of comity and to reduce the burdens upon the federal courts; these being the purposes of Title 28 United States Code, section 2254(b). As this Court only recently noted in *California v. Green,* ..... U.S. ....., ..., 30 U.S. Sup. Ct. Bull. B2329, B2349 (June 23, 1970), a harmless-error question is more appropriately resolved by the state court in the first instance. Insofar as the majority below concludes that it was proper for the district court to pass upon the *Bruton* claim without referring the petitioner to the state courts, the majority opinion errs.

CONCLUSION

As a result of the majority opinion below, the sixth amendment right of confrontation has been contorted beyond recognition, the *Bruton* rule carried past the pale of logic, and *Harrington* has suffered serious erosion. Furthermore, delicate federal-state relations are subjected to unnecessary strain while the federal judiciary shoulders an even greater share of the burden of collateral review. For these reasons, we respectfully urge that this petition for a writ of certiorari be granted.

Dated, San Francisco, California,
June 29, 1970.

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General,
DERALD E. GRANBERG,
Deputy Attorney General,
CHARLES R. B. KIRK,
Deputy Attorney General,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Joe J. B. O'Neil, Plaintiff-appellee, vs. Louis S. Nelson, Warden, Defendant-appellant.	No. 23,149

[January 26, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: Browning and Duniway, Circuit Judges, and Solomon.* District Judge

Duniway, Circuit Judge:

O'Neil is a California prisoner, convicted on two counts under the California Penal Code, kidnapping for purposes of robbery (§ 209) and robbery in the first degree (§ 211), and vehicle theft (Cal. Veh. Code § 10851). On April 25, 1968, O'Neil filed an application for a writ of habeas corpus in the United States District Court, which granted the writ. The warden appeals (28 U.S.C. § 2253).

*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

1. *The facts.*

The District Judge made his ruling on the basis of the record of the California trial. This is what that record shows. O'Neil was tried with his alleged partner in the crimes, Roosevelt Runnels. The prosecution presented three witnesses, the victim and two policemen. The victim testified that while he was waiting for his wife in a grocery store parking lot the defendants entered his car at gunpoint. They took about eight dollars from his wallet, forced him to drive several blocks from the market and get out of his car, and then drove away.

One of the policemen testified that later the same evening he had responded to a call from a liquor store operator who was suspicious of a white Cadillac circling the block outside his store. When the squad car followed the Cadillac, one of its occupants threw a gun out of the window. The police stopped the car and arrested its occupants. The car belonged to the victim; its occupants were the defendants.

The other policeman testified (over objection) to a statement made to him by O'Neil's co-defendant Runnels two days after the arrest. Runnels' purported statement coincides almost exactly with the victim's story so far as they overlap, but gives considerable credit to O'Neil for masterminding and directing the day's work. Runnels is alleged to have said that O'Neil came to his place in the afternoon before the robbery and asked him if he wanted "to make a couple of hits," and that after the occurence in question they decided to drive over to rob the liquor store, and were

circling outside waiting for the customers to leave when they were arrested.

Both defendants relied almost entirely on an alibi. Each took the stand and testified that they had been at O'Neil's house at the time of the robbery, and that they had been given the car to drive an acquaintance without warning that it did not belong to him. Several defense witnesses corroborated parts of the story. Runnels flatly denied having made the statement to the policeman, both on direct and cross-examination.

O'Neil's counsel did not cross-examine Runnels. He was trying to establish the same alibi to which Runnels was testifying and obviously did not want to ask about the veracity of an out-of-court statement that both he and Runnels wished to convince the jury had never been made. The efforts of the prosecutor to trip up Runnels were to no avail; he flatly and consistently denied having made the statement. Presumably, if O'Neil's counsel had cross-examined on the subject, the result would have been the same.

Before the officer testified about the statement of Runnels, the court instructed the jury as follows:

> "Before you relate the conversation, I will instruct the jury that this statement is to be received and considered by the jury only as to the Defendant Runnels, the one who was making the statement, and is not to be considered by the jury in any manner as against his co-defendant, Defendant O'Neil."

2. *Violation of the Bruton rule.*

At the close of the prosecutor's case, there was presented the exact situation that was condemned by the

Supreme Court in *Bruton v. United States,* 1968, 391 U.S. 123, made fully retroactive in *Roberts v. Russell,* 1968, 392 U.S. 293. The warden argues, however, that the *Bruton* error was cured because Runnels took the stand and so was available for cross-examination by counsel for O'Neil. Thus there was an opportunity to confront and cross-examine Runnels, lack of which is the basis for the *Bruton* decision. See *Parker v. United States,* 9 Cir., 1968, 404 F.2d 1193.

We think that in this case the error was not cured. The Court in *Bruton* relied heavily on its earlier opinion in *Douglas v. Alabama,* 1965, 380 U.S. 415. It is significant to note the use made of that case in *Bruton.* In *Douglas,* the statement of a convicted comrade in the crime (Loyd) was introduced to "refresh the memory" of Loyd when the state called him to the stand. It was presented in questions, piece by piece, over strong objection and despite Lloyd's absolute refusal to testify. In *Bruton* this near-misconduct (or dereliction of judicial duty) aspect of the case was not relied upon and the Court said:

> "We noted [in *Douglas*] that 'effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. . . .'"

It is true that in O'Neil's case Runnels did take the stand and was thus available for cross-examination. But he did not "affirm the statement as his"; he flatly denied making it. Under these circumstances, while the statement was admissible against Runnels, both

as an admission or confession and for impeachment, it never became admissible against O'Neil. Yet it remained in the record, and *Bruton* tells us that the court's instruction to the jury is, as a matter of law, ineffective.

The damage done by the out-of-court statement was just what it would have been had Runnels refused to take the stand at all.

The only circuit that has squarely faced the question presented by this case is the Sixth. In *Townsend v. Henderson,* 6 Cir., 1968, 405 F.2d 324, a co-defendant's confession was admitted in a trial for jailbreaking. In reversing denial of habeas corpus, the court said:

> "The only possible distinction between the present case and *Bruton* is that in *Bruton* the co-defendant did not take the witness stand, whereas here Terry did testify in his own behalf. But, this distinction is unimportant since, although Terry was called as a witness, he denied making the confession. Townsend therefore had no effective right of cross-examination in regard to the confession. A similar question was presented in *Douglas v. Alabama,* 380 U.S. 415 . . . (1965), and it was there held 'effective confrontation of Loyd was possible only if Loyd affirmed the statement as his.'" (405 F.2d at 329)

See also *West v. Henderson,* 6 Cir., 1969, 409 F.2d 95.

A number of circuits, including this one, have considered the application of *Bruton* in cases in which a co-defendant has taken the stand after the introduction of his out-of-court statement. But the cases that

have rejected challenges under the *Bruton* rule have been careful to emphasize that effective cross-examination was possible, and usually, that it acutally occurred.

In *Santoro v. United States,* 9 Cir., 1968, 402 F.2d 920, the three co-defendants whose out-of-court statements were introduced took the stand and were examined and cross-examined at length:

> "Thus, appellant's three codefendants took the stand and each testified regarding the subject of his or her out-of-court statements which implicated appellant. On this ground we distinguish *Bruton*. . . ." (402 F.2d 922.)

In *Rios-Ramirez v. United States,* 9 Cir., 1969, 403 F.2d 1016, *cert. denied,* 394 U.S. 951, we said:

> "As in *Santoro,* and contrary to the case in *Bruton,* defendant Manzano in the present case took the stand and testified regarding the subject of her out-of-court statements. Much of her direct testimony concerned appellant Rios-Ramirez."
>
> . . . .
>
> "Thus, appellant not only had an opportunity to confront the person whose statements inculpated him, but he in fact took advantage of this opportunity . . . " (1017)

In *Ignacio v. Guam,* 9 Cir., 1969, 413 F.2d 513, we summarized our holdings in *Santoro* and *Rios-Ramirez:*

> "In both *Rios-Ramirez* and *Santoro* we found the rule of *Bruton* inapplicable because the co-defendants whose out-of-court statements were used to incriminate petitioners Rios-Ramirez and San-

> toro all took the stand and testified regarding the subject of their extrajudicial declarations." (515)

Ignacio, however was decided on harmless error grounds.

Parker v. United States, 9 Cir., 1968, 404 F.2d 1193, is not to the contrary. There we pointed out that "[j]oint trials of persons charged together with committing the same offense or with being accessory to its commission are the rule, rather than the exception. There is a substantial public interest in this procedure. . . ." (1196) In rejecting the *Bruton* argument we said:

> "[S]ome of the facts mentioned in the out-of-court statements . . . were also proved by direct testimony. Others were merely small bits and pieces of a larger picture and can hardly have had any substantial effect upon the verdict. Finally, Orlando took the stand and was subject to cross-examination." (citing *Santoro* and *Rios-Ramirez.*)

We also rejected Parker's argument that he had no right to cross-examine his co-defendant. Most of the evidence about which Parker was complaining came from the mouths of the co-defendants on the witness stand. That which came from the recital by F.B.I. agents of out of court statements was of minor importance. In essence, *Parker* is a harmless error case.

In *United States v. Elliott,* 9 Cir., 1969, ... F.2d ...., (Nos. 23,646 and 23,647, decided October 31, 1969), there was no out-of-court statement. The defendant was objecting to the direct testimony of a partner in

crime. Again we emphasized the adequacy of the cross-examination:

> "In this case Henne appeared in court, testified, and was subjected to extensive cross-examination by Elliott's counsel; thus, there was full confrontation."

Other circuits, in rejecting challenges under *Bruton*, have been careful to distinguish the situations before them from the situation in this case. See, *e.g.*, *United States v. Ballentine*, 2 Cir., 1969, 410 F.2d 375; *United States v. Jackson*, 6 Cir., 1969, 409 F.2d 8; *United States v. Lipowitz*, 3 Cir., 1969, 407 F.2d 597; *Lewis v. Yeager*, 3 Cir., 1969, 411 F.2d 414.

3. *Harmless error.*

The warden urges that if the *Bruton* rule was violated, the error was harmless beyond a reasonable doubt, *Chapman v. California*, 1967, 386 U.S. 18. We think not.

Although the alibi may seem incredible (the jury certainly did not believe it), and the victim positively identified the defendants in court, we cannot say that the admission of Runnels' statement did not harm O'Neil beyond a reasonable doubt. Some doubt was raised about the victim's identifications, and the alibi witnesses stuck by their stories. The remarkable agreement between Runnels' out-of-court statement and the victim's testimony is very persuasive; the statement offers a plausible explanation of the defendant's motives and actions before, during and after the robbery. It seems to us more likely than not that Run-

nels' statement dispelled the doubts of the jury. *Harrington v. California*, 1969, 395 U.S. 250 does not persuade us that the error here was harmless. The state's case here was not overwhelming in the sense that the state's case was overwhelming in *Harrington*.

4. *Exhaustion of state remedies.*

The warden argues that O'Neill has not exhausted his state remedies. The *Bruton* question was never presented to the state courts for the very good reason that *Bruton* had not been decided when O'Neil filed his federal petition. See *Ashley v. California*, 9 Cir., 1968, 397 F.2d 270; *United States ex rel. Walker v. Fogliani*, 9 Cir., 1965, 343 F.2d 43; *Blair v. California*, 9 Cir., 1965, 340 F.2d 741. See also *United States ex rel. Heirens v. Pate*, 7 Cir., 1967, 401 F.2d 147; *United States ex rel. De Lucia v. McMann*, 2 Cir. 1967, 373 F.2d 759; *United States ex rel. Martin v. McMann*, 2 Cir., 1965, 348 F.2d 896 (*in banc*). *Cf. United States ex rel. Bagley v. LaVallee*, 2 Cir., 1954, 332 F.2d 890.

On the other hand, the doctrine of exhaustion of state remedies, as codified in 28 U.S.C. § 2254, is based on comity, not jurisdiction. See *Bowen v. Johnston*, 1939, 306 U.S. 19, 27; *Hunt v. Warden*, 4 Cir., 1964, 335 F.2d 936, 940. *Cf. Wilson v. Anderson*, 9 Cir., 1967, 379 F.2d 330, *rev'd*, 330 U.S. 523 (1968). As we said in *Walker*, 343 F.2d at 47:

> "There is no doubt as to whether or not the District Court had the power to entertain the petition for writ of habeas corpus. It had the power, a power which has been vested in the Federal Dis-

> trict Courts since the Act of February 5, 1867 c. 28, § 1, 14 Stat. 385-386) extended the Federal writ to state prisoners and perhaps before. *Townsend v. Sain*, 1963, 372 U.S. 293. . . . The question is one as to how the power should be appropriately exercised."

When O'Neil filed his federal petition he had exhausted his then state remedies. No evidentiary hearing was held; none was or is required. *Bruton* gave him a "new" ground. It is a state ground as well as a federal one, because the state courts are bound by decisions of the United States Supreme Court construing the Constitution of the United States. The "facts," *i.e.*, the contents of the state record, are not disputed. The only question is one of law and federal law at that. The record shows that O'Neil did present the question, (but obviously could not cite *Bruton* or *Roberts v. Russell*, both *supra*) to the California courts. He relied on a decision of the California courts, *People v. Aranda*, 1965, 63 Cal.2d 518, which anticipated *Bruton*. The California Supreme Court has held, however, in *People v. Charles*, 1967, 66 Cal.2d 330, that *People v. Aranda* was not retroactive, that it did not apply to decisions that were then final. This is contrary to the *Roberts* rule of the Supreme Court, as applied to *Bruton*. But the *People v. Charles* holding did not affect O'Neil, because the affirmance of his conviction occurred only five days before *People v. Charles* was decided. His conviction was not final; he could and did apply for a rehearing, which was denied. He then sought habeas corpus in the California Supreme Court, which was also denied. Thus

substantially the same question that he now presents was presented to and decided by the California court, California having anticipated *Bruton*. We can find here no benefit to California's administration of justice, no amelioration of state-federal relationships, in requiring that O'Neil again wend his way through California's courts. Federal law requires the decision that the District Judge made. Under the peculiar facts of this case, we agree with the District Judge that O'Neil has done enough so that he can be fairly said to have exhausted his state remedies. We here exercise our discretion to sustain that ruling.

We think that the matter is controlled by *Roberts v. LaVallee,* 1967, 389 U.S. 40, and by our decision in *Pope v. Harper,* 1969, 407 F.2d 1303. As we there pointed out, *Roberts v. LaVallee* has destroyed whatever support the warden might find in *Blair, supra.* In *Ashley* and *Walker, supra,* there was fact finding to be done, and we thought it appropriate that the state courts be given the opportunity to find the facts.

Affirmed.

Solomon, Dissenting:

We may be nearing the day when a co-defendant's confession in a joint trial will be barred, but I do not believe *Bruton v. United States,* 391 U.S. 123 (1968), or any other case cited by the majority goes that far.

Here, a police officer testified that after the arrest of Runnels, a co-defendant, Runnels confessed that on the day of the crimes O'Neil asked him if he

wanted "to make a couple of hits." According to the officer, Runnels said that the two of them entered the victim's car and at gunpoint took the victim's money. They forced the victim to drive several blocks and get out of his car. They then drove away in the victim's car. In his defense, Runnels took the stand and denied making the confession. He testified that he and O'Neil did not commit the crimes and that they were at O'Neil's house at the time. O'Neil also took the stand, and he too testified that they were at his house at the time of the crimes. Two other defense witnesses corroborated this testimony.

In *Bruton*, the Government introduced co-defendant Evans' confession, but Evans refused to testify. The Supreme Court set aside Bruton's conviction because Evans' refusal to take the stand "posed a substantial threat to [Bruton's] right to confront the witnesses against him" and denied Bruton a fair trial. 391 U.S. at 137.

According to the majority here, the State's introduction of Runnels' confession created a *Bruton* situation which was not cured by Runnels' subsequent testimony because Runnels refused to acknowledge the confession as his.

The majority believes that *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Bruton* require a confession to be excluded whenever the co-defendant denies that he made it. In *Douglas*, the defendant was convicted in a separate trial, of assault with intent to murder. At the trial, the prosecutor asked leading questions to tell

the jury about a confession of Loyd, an accomplice. According to the confession, Douglas shot the victim. Loyd refused to testify.

The Supreme Court reversed Douglas' conviction because Douglas could not cross-examine Loyd "to test the truth of the statement itself," 380 U.S. at 420, and held that Douglas was unfairly prejudiced by his inability to cross-examine Loyd.

The Supreme Court also stated that "effective confrontation of Loyd was possible only if Loyd affirmed the statement as his." 380 U.S. at 420. Relying on this statement, the majority here holds that O'Neil's conviction must be reversed because Runnels did not affirm the confession as his.

I do not believe *Bruton* and *Douglas* require exclusion of the confession here. In each case, the co-defendant refused to testify, and he therefore could not be cross-examined. Here, Runnels testified, and his testimony was subject to cross-examination. O'Neil elected not to cross-examine Runnels because Runnels supported O'Neil's alibi when he testified that O'Neil was with him at O'Neil's house at the time of the crimes.

The majority also cites *West v. Henderson*, 409 F. 2d 95 (6th Cir. 1969), and *Townsend v. Henderson*, 405 F.2d 324 (6th Cir. 1968), in support of its position.

In *West*, the defendant and two others were tried for first degree murder in Tennessee, where the jury fixes the punishment and has the power to impose a

death sentence. The prosecutor introduced the statement of one of the co-defendants, who denied making the statement. According to the Sixth Circuit, this statement, which the prosecutor called a "confession," was "a studied effort on the part of [the co-defendant] to exculpate himself and to inculpate [the defendant]." 409 F.2d at 97. The Court held that introduction of the confession was fundamentally unfair to the defendant and reversed his conviction.

In *Townsend*, Terry was placed in solitary confinement after an attempted prison break and was interrogated about the details of the incident. He confessed that he, Townsend, and two others planned the break and attempted to carry it out. At the joint trial of Terry and Townsend, the prosecutor introduced the confession. Terry denied that he confessed. The Sixth Circuit reversed Terry's conviction because it found that the State had pressured Terry into confessing by placing him in solitary confinement on a diet of bread and water and without medical treatment. The Court also reversed Townsend's conviction because Townsend could not cross-examine Terry on the details of the confession.

In *West*, the defendant's life depended on his being able to show that the co-defendant's story, which placed the primary blame on the defendant, was false and that the co-defendant wanted to shift the blame for the crime to the defendant. In *Townsend*, the defendant might have shown that the co-defendant implicated him because the co-defendant wanted to get out of solitary confinement.

Here, as in *West* and *Townsend,* O'Neil could not question Runnels on the details of the confession. But here, unlike *West* and *Townsend,* O'Neil did not want to question Runnels about the confession. O'Neil knew that the jury would not believe the alibi to which both he and Runnels testified unless Runnels could convince the jury that he did not confess. It was important for O'Neil that Runnels appear to be a witness worthy of belief. O'Neil was anxious to avoid doing anything which might damage Runnels' credibility.

If Runnels had acknowledged the confession, the testimony of the officer would have been admissible against Runnels. O'Neil could have cross-examined Runnels on the confession. *Rios-Ramirez v. United States,* 403 F.2d 1016 (9th Cir. 1968), *cert. denied* 394 U.S. 951 (1969); *Santoro v. United States,* 402 F.2d 920 (9th Cir. 1968).

If the State had not presented Runnels' confession as part of its case, and if Runnels had testified that he and O'Neil were at O'Neil's house at the time of the crimes, the State could have used the confession to impeach Runnels' testimony. *Cf. Lewis v. Yeager,* 411 F.2d 414 (3d Cir. 1969); *United States v. Ballentine,* 410 F.2d 375 (2d Cir. 1969).

In either case, O'Neil would be privileged to cross-examine Runnels. The best O'Neil could hope for would be for Runnels to testify that the confession was false and that O'Neil did not commit the crimes. Here, Runnels gave O'Neil all that and more. He denied that he confessed and said that O'Neil was not at the scene of the crimes.

Unless we are willing to hold that use of a co-defendant's confession is impermissible when the co-defendant admits that he confessed and when the State uses the confession for impeachment, I do not see how we can decide that the use of the confession under the facts here by a state court was impermissible or that, if it was error, it was error of constitutional proportions. I do not believe *Bruton* requires that we go that far, and I believe that such a decision would be contrary to the recent decisions of this and other Courts of Appeals in *Rios-Ramirez*, *Santoro*, *Lewis*, and *Ballentine*.

I would reverse the decision below and hold that the use of Runnels' confession did not deprive O'Neil of a fair trial.

Appendix B

In the United States District Court for the Northern District of California

Case No. 49,136

Joe J. B. O'Neil, Petitioner,

vs.

Louis S. Nelson, Warden, Respondent.

ORDER GRANTING WRIT OF HABEAS CORPUS

Petitioner, Joe J. B. O'Neil, is imprisoned in the California State Prison at San Quentin, California, pursuant to judgment of the Superior Court of the State of California in the County of Los Angeles dated June 17, 1965. The judgment reflects that petitioner was convicted by jury of the felonies of kidnapping for the purpose of robbery, robbery in the first degree and vehicle theft. Petitioner appealed his convictions to the California Court of Appeal and they were affirmed by that Court on March 30, 1967. Petition for rehearing of the appeal was denied April 26, 1967, and an application to recall the remittitur was denied by the Court on February 7, 1968. Thereafter petitioner filed an application for habeas corpus with the California Supreme Court on March 7, 1968

which was denied by that Court without opinion March 20, 1968.

The Court issued its order to show cause herein to the respondent on April 23, 1968. Thereafter, on May 17, 1968, the return to the order to show cause was filed herein by the Attorney General of the State of California in which return respondent argued that petitioner had presented no federal question, relying on the 1957 U.S. Supreme Court case *Delli Paoli v. United States,* 352 U.S. 232 (1957). On May 20, 1968, the U.S. Supreme Court decided *Bruton v. United States,* ..... U.S. ....., to be found at 36 U.S.L. Week 4447, in which it expressly overruled the *Delli Paoli* case. Accordingly, the Attorney General on behalf of the respondent, filed a supplemental return on June 10, 1968 and a second return on June 13, 1968, after the U.S. Supreme Court on June 10 rendered a per curiam decision in *Roberts v. Russell,* 36 U.S.L. Week, 3472.

It is without question herein that the rule laid down in the *Bruton* case applies to our problem. The petitioner's co-defendant, one Runnels, having made a confession implicating petitioner, the confession having been admitted at the trial and submitted to the jury. It is also clear that the case of *Roberts v. Russell* holding that *Bruton* is applicable to the states and is to be given full retroactivity likewise applies to the problem here.

The respondent, therefore, is left to rely upon two points which he vigorously argues to this Court in his supplemental return filed on June 10, 1968:

1) that petitioner has failed to exhaust his available state remedies, and,

2) that in any event, the use of petitioner's co-defendant's statement, while error as to petitioner, was harmless beyond a reasonable doubt.

It is the opinion of this Court that each of these contentions can be readily disposed of.

1) Petitioner has presented his application to the State Supreme Court and in that application he raises the issues which are now before this Court. It is true that that application was presented and denied prior to the decisions of the U.S. Supreme Court in *Bruton* and *Roberts*. The Attorney General requests that in light of the change in law effected by *Bruton*, the state court should be permitted to pass on that question. In this regard, it is to be noted that the date of petitioner's conviction was June 17, 1965 and that the Supreme Court of California thereafter on November 12, 1965 in the case of *People v. Aranda*, 63 Cal.2d 518, established a state rule of practice in accordance with the subsequent rule of the Supreme Court of the United States in *Bruton*. Thereafter the Supreme Court of California reviewed petitioner's application for writ of habeas corpus filed with it on March 7, 1968 and denied without opinion this application on March 20, 1968. The Attorney General has filed with this Court, petitioner's application to the Supreme Court of California, a reading of which will indicate that he raised the same issue in that application as he sets forth herein. It should be noted here that the Supreme Court of California in the case of

People v. Charles, 66 Cal.2d 330 (1967) held that the rule established in *Aranda* did not require its application to convictions which had become final. Petitioner's conviction, as indicated above, had occurred on June 17, 1965. It may also be noted that the U. S. Supreme Court on June 10, 1968 decided *Roberts v. Russell, supra,* in which case the *Bruton* rule was made applicable to the states and given full retroactivity. Under all these circumstances, it is the opinion and belief of this Court that petitioner herein has exhausted his remedies, his petition having been filed in this Court on May 17, 1968, prior to both the *Bruton* and *Roberts* opinions of the U.S. Supreme Court.

2) The Court is also of the opinion, after a review of the entire record herein, including the transcript of petitioner's trial in the Superior Court and all of the evidence therein that it can not apply the rule in *Chapman v. California,* 386 U.S. 18 (1967) and determine that the statement admitted into evidence by petitioner's co-defendant was harmless error and that the state had proved beyond a reasonable doubt that this error did not contribute to the verdict obtained. It is true that petitioner was identified by the victim of the crimes of which he was convicted and that the identifications were positive as far as the record was concerned, further, that he did have possession of the victim's automobile at the time of his arrest and that the trial court concededly gave clear instructions to the jury to disregard the co-defendant's inadmissible evidence inculpating petitioner. This Court can not at this time second guess what the jury may have considered or not considered in arriv-

ing at its guilty verdicts. The record indicates that both the co-defendant and petitioner testified that they produced other witnesses who testified to their presence elsewhere at the approximate time of the robbery and kidnapping and testified themselves denying the crime, as well as attempting to explain certain of the evidence against them. It is true that the jury may not have believed any of these witnesses offered by the defendants or the defendants themselves and if this is so, then the evidence is overwhelming against them and they are guilty beyond a reasonable doubt, but if the jury gave consideration to this defense evidence, then it can not be said beyond a reasonable doubt that petitioner was not prejudiced and in the context of the joint trial was not deprived of a fair trial because of the inadmissible evidence and the deprivation of his rights to cross-examination in the context of the joint trial.

Accordingly, the petitioner is ordered discharged from the custody of the respondent, execution of this order is stayed ten (10) court days to allow the Attorney General to file, if he so desires, notice of appeal. Should such notice of appeal be filed within a period of the above indicated stay, it shall be further stayed and the custody of the petitioner shall not be disturbed until a further order of this Court.

Dated: July 12, 1968.

Albert C. Wollenberg,
United States District Judge

Filed July 12, 1968,
James P. Welsh, Clerk.